

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

ORIGINAL

75-7649

United States Court of Appeals
For the Second Circuit

MARVIN STERN,

*Plaintiff-Appellee
and
Cross-Appellant,*

against

SATRA CORPORATION and
SATRA CONSULTANT CORPORATION

*Defendants-Appellants
and
Cross-Appellees.*

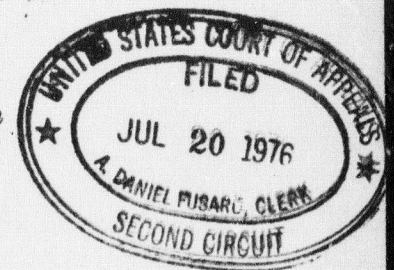
Appeal from a Judgment of the United States
District Court for the Southern District of New York

**PETITION FOR REHEARING BY
DEFENDANTS-APPELLANTS SATRA CORPORATION
AND SATRA CONSULTANT CORPORATION**

WEBSTER & SHEFFIELD
*Attorneys for Satra Corporation
and Satra Consultant Corporation*
One Rockefeller Plaza
New York, New York 10020
(212) 582-3370

Of Counsel:

THOMAS W. HILL, JR.
ALBERT M. APPEL



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARVIN STERN,	:	
	:	
Plaintiff-Appellee	:	
and	:	
Cross-Appellant,	:	Docket No. 75-7649
	:	
-against-	:	
	:	<u>PETITION FOR REHEARING</u>
SATRA CORPORATION AND SATRA CON-	:	
SULTANT CORPORATION,	:	
	:	
Defendants-Appellants	:	
and	:	
Cross-Appellees.	:	
	:	
- - - - -	:	-x

TO:

THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT:

Defendants-Appellants and Cross-Appellees Satra Corporation and Satra Consultant Corporation ("Satra") jointly submit this Petition for Rehearing ("Petition") in the above entitled action, and state the following in support thereof.

INTRODUCTION

On July 6, 1976 this Court rendered its decision affirming the judgment entered in the within action by

the United States District Court for the Southern District of New York. One of the grounds of Satra's appeal from that judgment was its view that the District Court committed reversible error by failing to instruct the jury that a party is entitled to rescind a contract induced by material misrepresentations of fact even though the misrepresentations were made without an intent to deceive.

In Part II of its decision, this Court agreed that Satra's statement of the New York law of rescission based on innocent misrepresentation was correct. However, this Court went on to hold that the legal principle in issue was inapplicable to the present action because in its view, Stern's representations were only statements of opinion and not statements of fact.

This Petition is directed solely toward the findings of the Court set forth in Part II of its decision. Satra respectfully submits that this Court overlooked or misapprehended the following principles of law in holding that Stern's statements were statements of opinion rather than statements of fact:

(a) The question of whether Stern's statements were opinions or facts should be decided by a jury, as the District Court properly held below;

(b) A statement of opinion expressed by one in a fiduciary and confidential relationship may be regarded as an assertion of fact for which liability may be imposed; and

(c) Statements of the intentions of third parties are statements of fact and not statements of opinion.

I

THE QUESTION OF WHETHER STERN'S
STATEMENTS WERE OPINIONS OR FACTS
SHOULD BE DECIDED BY A JURY

Satra recognizes that this Court may not agree, even under the principles of law set forth in Points II and III, infra, that as a matter of law Stern's statements were statements of fact to which the law of innocent misrepresentation should apply. At the very minimum, however, the question of "fact vs. opinion" should be decided by a jury, and this Court should not usurp the jury's function by deciding the question on its own in the face of such a substantial factual record. Indeed, at the trial below, Stern agreed that the question of "fact vs. opinion" should be submitted to the jury, and Stern's attorneys even requested Judge Lasker to amplify his charge to

the jury on this point (917-18A)*, which request Judge Lasker granted (918A; 932A).

Satra strongly urges that a finding that certain statements are statements of opinion and not fact as a matter of law should be reserved for the most clear-cut of situations, and that this simply is not such a situation. This principle was recognized in Florence v. Crummer, 93 F.2d 542 (5th Cir. 1938), cert. denied, 304 U.S. 563 (1938), where the Fifth Circuit sustained the denial of a motion for a directed verdict in the face of evidence presented to show that defendant induced plaintiff to agree to allow defendant to negotiate a loan on plaintiff's behalf by representing, inter alia, that defendant "had great influence with the [loan company] and could negotiate a favorable loan" if plaintiff would make certain concessions. As stated in Bareham & McFarland, Inc. v. Kane, 228 App.Div.396, 240 N.Y.S. 123 (4th Dept. 1930):

"No hard and fast rule can be laid down as to what constitutes a fraudulent representation in any particular case. This result, of necessity, depends upon the peculiar circumstances and conditions involved. In cases of doubt, where the statements relied upon are capable of

* References followed by the letter "A" are to the appendix on appeal.

two interpretations, one of which would indicate that they were intended as a positive assertion of some past or present fact, which is susceptible of knowledge, and the other which would signify that they were nothing more than an estimate, opinion, expression of belief, or prophecy of what would occur in the future, the question is one which should be passed upon by a jury." 228 App. Div. at 398, 240 N.Y.S. at 127.

Consequently, this case should be remanded for a new trial before a jury which is properly instructed on the law of "fact vs opinion" and the law of innocent misrepresentation.

II

A FIDUCIARY AND CONFIDENTIAL RELATIONSHIP IMPOSES LIABILITY FOR UNTRUE STATEMENTS OF OPINION

Satra submits that this Court erred by not considering the fiduciary and confidential relationship between Stern and Satra in finding that Stern's statements were not statements of fact.

A. Stern and Satra were Partners and Joint Venturers in their Relationship with IBM

A partnership and joint venture was the undeniable premise and result of the negotiations between Stern and Satra. The record is replete with references to the parties' intention to enter into such a relationship (120-21A; 209A; 691A; 858-59A; 1005-06A). Indeed, Stern admitted in his reply brief that "the

[Stern-Satra] agreement is a joint-venture agreement" (Stern's Reply Brief, p. 13).

B. As Partners and Joint Venturers, Stern and Satra were in a Fiduciary Relationship of Trust and Confidence

New York has long imposed special responsibilities on joint venturers, who are treated as partners under the law:

"The incidents of a joint adventure and the obligation of the members thereof toward each other are in many respects so similar to those existing in a partnership that their rights, duties and liabilities are to be tested by rules which are closely analogous to and generally substantially the same as those which govern partnerships.... As joint adventurers, a fiduciary relationship existed ... which imposes upon them a duty of loyalty, good faith and fair dealing toward each other"
Schlesinger v. Regenstrief, 135 N.Y.S.2d 858, 862 (Sup. Ct. N.Y. Co. 1954).

And as expressed by the New York Court of Appeals as long ago as 1874, "[t]he relation of partners with each other is one of trust and confidence." Mitchell v. Reed, 61 N.Y.123 (1874).

C. Based on Stern's Fiduciary Relationship with Satra, His Statements Concerning IBM Are Actionable Representations of Fact

Even if, under other circumstances, Stern's statements to Satra might be considered as statements of opinion, his fiduciary and confidential relationship with Satra, together with his position of superior knowledge, require

a finding that Stern's statements are actionable representations of fact. Dellefield v. Blockdel Realty Co., 128 F.2d 85, 90 (2d Cir. 1942); In re Levy's Estate, 19 App.Div.2d 413, 417, 244 N.Y.S.2d 22, 28 (1st Dept. 1963). As stated by the Appellate Division of the very Judicial Department in which this Court sits,

"where such fiduciary or confidential relationships are involved even misrepresentations of legal opinion, not otherwise actionable, may sustain an application for relief." In re Levy's Estate, 19 App.Div.2d at 417, 244 N.Y.S.2d at 28.

In the context of the present action, Stern's statements concerning IBM were not those of an arm's length negotiator expressing his own opinion as to his worth to a business relationship. It must be remembered that Satra attended its first meeting with IBM only after Stern had told Oztemel that IBM was interested in entering into a relationship with Satra. It must further be remembered that this first meeting occurred only after IBM's representative (Ralph Stafford) had telephoned Stern (after obtaining Stern's telephone number from the Satra switchboard in New York) to arrange such a meeting. And during his negotiations with Satra, Stern arranged for and attended all the meetings between Satra and IBM personnel. Satra was certainly entitled to believe that Stern had knowledge as to his influence with IBM and his importance to a Satra - IBM relationship

superior to that of Satra. And Satra was certainly entitled to rely on the statements made by its own partner and joint venturer, who was concurrently participating in conferences with IBM as Satra's own representative. Under these circumstances, and under the principles of law cited above which Satra believes were overlooked by this Court, it should be held that Stern's statements, far from being mere puffing by an independent negotiator, were actionable statements of fact by one under a fiduciary obligation to which the law of innocent misrepresentation should apply. At a very minimum, as described in Point I, supra, the question should have been submitted to the jury for decision, and this Court should not have replaced the jury's judgment on this issue with its own. Bareham & McFarland, Inc. v. Kane, 228 App. Div. 396, 240 N.Y.S. 123 (4th Dept. 1930).

III

REPRESENTATIONS CONCERNING THE INTENTIONS OF A THIRD PARTY ARE STATEMENTS OF FACT AND NOT OPINIONS

In addition to the principles of law applicable to statements made by an individual in a confidential relationship, this Court overlooked the principle of law that representations concerning the intentions or state of mind

of a third party are statements of fact and not opinion. As stated by Judge Fuld of the New York Court of Appeals in the leading case of Channel Master Corporation v. Aluminium Limited Sales Inc., 4 N.Y.2d 403 (1958):

"A person's intent, his state of mind, it has long been recognized, is capable of ascertainment and a statement of present intention is deemed a statement of a material existing fact, sufficient to support a fraud action." 4 N.Y.2d at 407.

This rule has been applied to representations concerning the state of mind of a third party.

"A representation of the state of mind ... of a third person is a misrepresentation if the state of mind in question is otherwise than as represented. Thus, a statement that a ... third person is of a particular opinion or has a particular intention is a misrepresentation if the person in question does not hold the opinion or have the intention asserted." Restatement of Torts, §525, Comment b.

Among Stern's statements to Satra in the present action were the representations that (a) IBM was interested in Satra because of Stern's technical capabilities which were not otherwise present in the Satra organization, and (b) that IBM would enter into an agreement with Satra only if Stern participated in the Satra-IBM relationship. These are clearly statements of IBM's intentions in dealing with Satra and IBM's opinion of the worth of Stern's services, statements which the evidence demonstrated were untrue. Under the law as described above, these statements of IBM's

intentions and opinion were not statements of opinion but statements of fact to which the law of innocent misrepresentation applies, and they should have been so held by this Court. And once again, at a minimum, this question should have been submitted to the jury for decision. Bareham & McFarland v. Kane, 228 App.Div.396, 240 N.Y.S. 123 (4th Dept. 1930).

IV

CONCLUSION

Based upon the foregoing principles of law which, it is respectfully submitted, were overlooked or misapprehended by this Court in affirming the judgment below, this Court should remand this case for a new trial before a jury properly charged (a) on the law of "fact vs opinion" in accordance with the principles stated herein, and (b) on the law of innocent misrepresentation.

Therefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted, and that judgment of the District Court be, upon further

consideration, reversed and that the case be remanded for a new trial.

Respectfully submitted,

WEBSTER & SHEFFIELD

Attorneys for Defendants-Appellants
and Cross-Appellees Satra Corporation
and Satra Consultant Corporation
One Rockefeller Plaza
New York, New York 10020
Tel. No.: (212) 582-3370

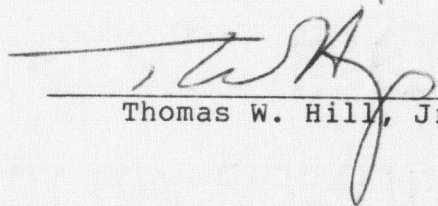
Of Counsel:

Thomas W. Hill, Jr.
Albert M. Appel

CERTIFICATE OF COUNSEL

I, Thomas W. Hill, Jr., a member of Webster & Sheffield, attorneys for defendants-appellants Satra Corporation and Satra Consultant Corporation, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

Dated: New York, New York
July 20, 1976

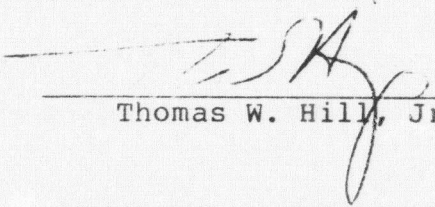


Thomas W. Hill, Jr.

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Dated: New York, New York
July 20, 1976



Thomas W. Hill, Jr.

Service of _____ 3 _____ copies of the
within _____ is hereby
admitted this _____ day of
_____ 19 _____

Signed _____

Attorney for _____

by [Signature]
STROCK & STROCK & LAYAN

JUL 20 1976

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